Supreme Court, U.S.
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No. 04-484

In The
Supreme Court of the United States

NATIONAL TAXPAYERS UNION,

Petitioner,

v.

UNITED STATES SOCIAL SECURITY ADMINSTRATION and KATHY A. BULLER, Inspector General, in her Official Capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I. Question Presented

Whether the Court should grant a writ of certiorari to resolve a conflict among the Circuits on whether this Court's decision in Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994) ("Thunder Basin") closes the district court doors to pre-enforcement judicial review of colorable claims of First Amendment unconstitutionality of an administrative agency's enabling statute, as the Fourth Circuit, joining the First, Sixth and Eighth Circuits, held in this case, or leaves the door open so long as there is no final agency order ripe for Court of Appeals review, as the Second, Third, Seventh, Ninth, Tenth and District of Columbia Circuits have held.

II. Parties and Corporate Disclosure Statement

The Petitioner is National Taxpayers Union ("NTU"), a not-for-profit Delaware corporation qualified as a charity under 26 U.S.C. § 501(c). It is not a publicly held corporation, nor is any part of it owned by one, and there is no other interested party. The Respondents are the United States Social Security Administration ("SSA"), an agency of the United States of America, and its inspector general, Kathy A. Buller, sued in her official capacity.

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III. Citation to Official and Unofficial Reports

The decision of the United States Court of Appeals for the Fourth Circuit which this petition seeks to have the Court review is officially reported at 376 F. 3d 239. It is unofficially reported at Unemployment Ins. Rep. (CCH) P17, 252B; 2004 U.S. App. LEXIS 14614. It is reprinted at App. 1A. The District Court opinion is not reported. It is reprinted at App. 6A.

IV. Basis for Supreme Court Jurisdiction

The decision of the Court of Appeals was filed July 15, 2004. This Court has jurisdiction to review the Court of Appeals decision by Writ of Certiorari under 28 U.S.C. § 1254(1).

V. Statutes in Issue

The statutes in issue are the Civil Monetary Penalty Law ("CMPL"), 42 U.S.C. § 1320a-7a, reproduced in the Appendix (due to its length) at 26A, and Section 1140 of the Social Security Act, 42 U.S.C. § 1320b-10, reproduced in the Appendix at 52A.

VI. Statement of the Case

A. Jurisdiction in United States District Court

Jurisdiction was based on general federal question jurisdiction, 28 U.S.C. § 1331. The decision on review, in holding pre-enforcement review barred by Thunder Basin, *supra*, sustained the District Court's

grant of a Rule 12(b)(1) motion asserting it lacked subject matter jurisdiction.

B. Facts

1. The Statutes Summarized

Section 1140[1] says that no person may use the words "Social Security" and "Social Security Administration" in a solicitation "or other communication," "in a manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted as conveying, the false impression that such item is approved, endorsed or authorized by the Social Security Administration...or that such person has some connection with, or authorization from, the Social Security Administration...", and authorizes a civil monetary penalty of $5,000 for each piece mailed.

CMPL[2] establishes an administrative process commencing with an agency charging decision, leading through an administrative judge hearing and intra-agency review before SSA and providing for review "of the proceeding and of the question determined therein" in a United States Court of Appeals after final agency order.[3] Post-final order enforcement is in United States District Court.[4]

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[1] 52A.

[2] 26A.

[3] 38A, 42 U.S.C. § 1320a-7a(e).

[4] 39A-43A, 42 U.S.C. § 1320a-7(f) and (g).

2. NTU's Survey/Solicitation

NTU is a charitable, non-profit organization engaged in research, education, and public advocacy concerning issues that it considers important to American taxpayers. One such issue is the financial stability of the Social Security program. As part of its campaign to reform the Social Security program, NTU distributed a mass mailing comprised of a letter and a survey. In the letter, NTU argued that the Social Security program is in dire financial condition and desperately in need of structural reform. The survey posed eight questions seeking respondents' reactions to the current condition of the Social Security program as well as NTU's favored reform, personal investment accounts. Both the letter and the survey solicited financial contributions for NTU. The mailing was marked, "OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY COMMISSIONED BY THE NATIONAL TAXPAYERS UNION FOR THE SOCIAL SECURITY ADMINISTRATION, WHITE HOUSE AND CONGRESS OF THE UNITED STATES." SSA told NTU that its mailing violated § 1140. SSA requested that NTU cease distribution of its surveys.

NTU initially indicated that it would change the design of its mailing to comply with SSA's demand. The revised mailing contained the following language: "OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY CONDUCTED BY THE NATIONAL TAXPAYERS UNION AND COMMISSIONED FOR THE WHITE HOUSE[,] UNITED STATES HOUSE OF REPRESENTATIVES [AND] UNITED STATES SENATE."

SSA expressed its dissatisfaction with NTU's revised mailing and threatened enforcement action.

3. District Court suit

NTU sued SSA in the United States District Court for the District of Maryland, based upon federal question jurisdiction. 28 U.S.C. § 1331. NTU alleged, *inter alia,* that § 1140 is facially invalid because it is unconstitutionally overbroad, violating the First Amendment Overbreadth ("FAO") doctrine, and that §1140 is unconstitutional as applied to NTU's revised mailing, contending that, as a charitable solicitation, NTU's mailing received full First Amendment protection.[5]

a. SSA's Motion

SSA moved to dismiss under Fed. R. Civ. P. 12(b)(1), contending that, under Thunder Basin, the District Court lacked jurisdiction. NTU cross-moved for summary judgment.

b. The District Court Decision[6]

The District Court granted the SSA's motion to dismiss the complaint. The court ruled that it lacked jurisdiction to consider NTU's pre-enforcement challenge to the constitutionality of § 1140. Relying on

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[5] See Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980); Illinois *ex rel* Madigan v. Telemarketing Associates, 538 U.S. 600 (2003).

[6] 14A.

Thunder Basin, the District Court held that the administrative review procedures described in CMPL are the exclusive means for attacking § 1140 prior to its actual enforcement against NTU.

4. The Fourth Circuit

a. The Appeal

NTU appealed to the Fourth Circuit. It argued that this case was unlike Thunder Basin, because the legislative history of CMPL and § 1140 was silent on intent to preclude pre-enforcement review, while the Thunder Basin court relied on explicit evidence of such intent. It also argued this case was uniquely unlike Thunder Basin, because there was no agency final order,[7] and the suit involved a facial unconstitutionality challenge to SSA's enabling statute. NTU relied on District of Columbia Circuit authority sustaining District Court jurisdiction for pre-enforcement challenges to an agency's organic act when there is no final agency order.[8] NTU pointed out that SSA had no authority to consider the

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[7] SSA had told NTU that SSA would commence an enforcement action, but it had not yet done so.

[8] See Time Warner Entertainment Co. v. F.C.C., 93 F. 3d 957 (D.C. Cir. 1996) ("Time Warner"); Action for Children's Television v. F.C.C., 59 F.3d 1249 (D.C. Cir. 1995) ("ACT"). See generally, Marchiano v. N.A.S.D., 134 F. Supp. 2d 90, 93 (D.D.C. 2001) (explaining D.C. Circuit rule).

constitutional challenge to its statute which NTU was raising.[9]

b. The Fourth Circuit Decision[10]

In affirming the District Court, the Fourth Circuit, in an opinion by Judge Shedd, read Thunder Basin broadly. It held that, like the Mine Safety Act involved in Thunder Basin, § 1140 and CMPL "too 'establishes a detailed structure for reviewing violations' of the statute."[11] Although admitting the legislative history was "scant," the Court of Appeals felt it was sufficiently similar to Thunder Basin to bar pre-enforcement challenges.[12] The court concluded that, because NTU's constitutional challenges were reviewable after the agency process, they could not be considered by a District Court prior to final order.[13] In a long textual footnote, Judge Shedd - inaccurately and disingenuously in NTU's view - tried to distinguish the D.C. Circuit cases, Time Warner and ACT.[14] Judge Wilkinson concurred and stated that § 1140 did not

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[9] Weinberger v. Salfi, 422 U.S. 749, 765-6 (1975); Ryan v. Bentsen, 12 F.3d 245 (D.C. Cir. 1993).

[10] 1A.

[11] 7A.

[12] 8A.

[13] 9A-10A.

[14] 10A-11A, n. 3.

seek "to silence criticism of the operations of a government program."[15]

VII. Reasons for Granting the Writ

A. Inter-Circuit Conflict

The Court should grant certiorari to resolve a conflict which has developed among the Circuits. The Fourth Circuit takes a broad view of Thunder Basin, reading it to ban pre-enforcement review whenever the administrative scheme provides for post-final order Court of Appeals review jurisdiction, joining the First, Eastern Bridge L.L.C. v. Chao, 320 F.3d 84 (1st Cir. 2003); Sixth, Reich v. Manganas Painting Co., 104 F.3d 801 (6th Cir. 1997); and Eighth, Great Plains Coop v. C.F.T.C., 205 F.3d 353 (8th Cir. 2000), Circuits in an expansive reading of Thunder Basin. By contrast, the District of Columbia Circuit's position that United States District Courts have jurisdiction to hear pre-enforcement non-final-agency-order challenges to an agency's enabling statute (as opposed to simple agency action), see Time Warner and ACT, *supra*, is joined by the Second, Merritt v. Shuttle, Inc., 245 F.3d 182 (2nd Cir. 2001); Cook v. Pan American World Airways, Inc., 771 F.2d 635 (2nd Cir. 1985); Third, Kreschollek v. Southern Stevedoring Co., 78 F.3d 868 (3rd Cir. 1996); Seventh, Czerkies v. U.S. Dep't of Labor, 73 F.3d 1435 (7th Cir. 1996) (*en banc*); Commodity Trend Service, Inc. v. C.F.T.C., 149 F.3d 679 (7th Cir. 1998), later opinion following same rule, 233 F.3d 981 (7th Cir. 2000); Ninth, Crist v. Leippe, 138 F.3d 801 (9th Cir. 1998); Mace v. Skinner, 34 F.3d 854 (9th Cir. 1994); and Tenth, Rocky

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[15] 12A-13A.

Mountain Radar, Inc. v. F.C.C., 158 F.3d 1118 (10th Cir. 1998), Circuits.

In Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) ("Abbott Laboratories"), this Court sustained District Court jurisdiction for pre-enforcement review even though post-enforcement final order Court of Appeals review was available. This Court phrased the issue as whether there was express Congressional intent to prohibit review, placing the burden to establish such intent on the agency seeking to avoid pre-enforcement review. 387 U.S. at 139-140. The Thunder Basin opinion appears to state a less pro-pre-enforcement review test, stating this Court will "find that Congress has allocated initial review to an administrative body where such intent 'is fairly discernable in the statutory scheme,'" 510 U.S. at 207, and relying on an examination of the statute's structure, purpose and legislative history, id., rather than demanding an express statement of preclusive purpose, as did Abbott Laboratories. Thunder Basin, however, did not involve a facial challenge to the agency's enabling statute, and this Court noted the unusual question raised by the plaintiff[16] and the fact that "petitioner expressly disavows any abstract challenge to the Mine Act's statutory review scheme."[17] Moreover, the Thunder Basin opinion states that Abbott Laboratories "is not to the contrary," and the Thunder Basin court said it had found legislative

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[16] The claim was that the agency's threatened action interfered with the plaintiff's rights under the National Labor Relations Act. See 510 U.S. at 206.

[17] 510 U.S. at 218, n. 22.

history in Abbott Laboratories of a design to allow pre-enforcement review. 510 U.S. at 212.

The Fourth Circuit, in this case, as well as the First, Sixth and Eighth Circuits, all point to Thunder Basin as establishing an unbreachable wall whenever post-final order Court of Appeals review is available. By contrast, the Circuits following the District of Columbia Circuit approach really do reconcile Thunder Basin with Abbott Laboratories, allowing pre-enforcement review unless there is demonstrable intent to preclude it or the issue is a run of the mill claim "cloaked in constitutional terms." Czerkies, *supra*, 73 F.3d at 1443.

This split in the Circuits is an important one; establishing the proper approach courts must use in analyzing government door-closing arguments will resolve a large number of cases, and, while each Court of Appeals decision discusses the specific statutory administrative scheme - as did this Court in Abbott Laboratories and Thunder Basin and the Fourth Circuit in this case - the cited cases from the split Circuits reveal a fundamental difference in how to approach the door-closing argument. As Judge Posner noted in Czerkies, *supra*, "[e]ach statute must stand on its own two feet, but each is informed by the presumption already mentioned against slamming the judicial door in the face of constitutional claims." 73 F.3d at 1441. Moreover, the District of Columbia Circuit rule recognizes that agencies cannot declare their enabling statutes unconstitutional, see Weinberger v. Salfi, *supra*; Johnson v. Robison, 415 U.S. 361 (1974), while the Fourth Circuit discounts this rule and ignores the

crucial fact that, because of the rule, the provisions of CMPL that the court of appeals "shall have jurisdiction of the proceeding and of the question determined therein..." 42 U.S.C. § 1320a-7a(e) (third sentence),[18] may render the enabling statute unconstitutionality claim unreviewable (because not a "question determined therein" [i.e., before SSA]) if the District Court door is closed.

B. The First Amendment

Of course, the District Court door should be open only if the constitutional attack on the agency's enabling act is colorable. Judge Wilkinson's Fourth Circuit concurrence suggests this is not the case, because the statute does not seek to "silence criticism" of government and merely forbids "impersonation." However, NTU is a charity, and charitable solicitations receive full First Amendment protection and are punishable only for actual fraud and deception. Illinois *ex rel* Madigan v. Telemarketing Associates, *supra*, 538 U.S. 600, 617-621; Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1998); Schaumburg v. Citizens for a Better Environment, *supra*. By contrast, § 1140 reaches not only actual fraud but also negligence ("should know would convey" a false impression of government approval) and strict liability with no fault ("in a manner which reasonably could be interpreted or construed as conveying" the false impression). While trying to serve the goal of protecting seniors against swindlers, Congress overreached. Moreover, § 1140 reaches not only solicitations, but also any "circular, book, pamphlet, *or other communication*, or a play,

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[18] 38A.

motion picture, broadcast, telecast, *or other production*" (emphasis supplied).[19] The honest writer, as well as the swindler, must worry about § 1140. For that reason, the overbreadth is so "substantial" as to invoke the FAO doctrine. See Board of Trustees v. Fox, 492 U.S. 469, 482-4 (1989).

VIII. Conclusion

This is an important case; the Fourth Circuit has expanded an already disturbing trend to overread Thunder Basin in the three other Circuits - in contradistinction to the sensible approach of the D.C. Circuit and five others - to denigrate an important constitutional claim which may evade judicial review. For that reason, the Court should grant the writ.

Respectfully submitted,

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[19] 52A.

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NATIONAL TAXPAYERS UNION, Plaintiff-Appellant, v. UNITED STATES SOCIAL SECURITY ADMINISTRATION; KATHY A. BULLER, in her official capacity as Chief Counsel to the Inspector General of the United States Social Security Administration, Defendants-Appellees.

No. 03-2232

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

376 F.3d 239; 2004 U.S App. LEXIS 14614; Unemployment Ins. Rep. (CCH) P17,252B

May 7, 2004, Argued
July 15, 2004, Decided
[ENTERED: July 15, 2004]

PRIOR HISTORY: [1]** Appeal from the United States District Court for the District of Maryland, at Baltimore. (CA-02-3949-WMN-1). William M. Nickerson, Senior District Judge.

DISPOSITION: Affirmed.

LexisNexis(R) Headnotes

COUNSEL: ARGUED: Michael Edward Geltner, GELTNER & ASSOCIATES, Washington, D.C., for Appellant.

Tara Leigh Grove, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

ON BRIEF: Peter D. Keisler, Assistant Attorney General, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Thomas M. DiBiagio, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland; Mark B. Stern, Appellate Staff, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellees.

JUDGES: Before WILKINSON, LUTTIG, and SHEDD, Circuit Judges. Judge Shedd wrote the opinion, in which Judge Luttig joined. Judge Wilkinson wrote a concurring opinion.

OPINIONBY: Shedd

OPINION: [*240] SHEDD, Circuit Judge:

This appeal presents the question whether the National Taxpayers Union may challenge the constitutionality of § 1140 of the Social Security Act, *42 U.S.C. § 1320b-10,* in federal district court before the Social Security Administration undertakes **[**2]** administrative proceedings to enforce that provision against NTU. We hold that it may not. Under *Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 127 L. Ed. 2d 29, 114 S. Ct. 771 (1994),* the district court lacks jurisdiction over NTU's pre-enforcement challenge to the statute.

I.

The National Taxpayers Union ("NTU") is a non-profit organization engaged in research, education, and public advocacy concerning issues that it considers

important to American taxpayers. One such issue is the financial stability of the Social Security program. As part of its campaign to reform the Social Security program, NTU distributed a mass mailing comprised of a letter and a survey. In the letter, NTU argued that the Social Security program is in a dire financial condition and desperately in need of structural reform. The survey posed eight questions seeking respondents' reactions to the current condition of the Social Security program as well as NTU's favored reform, personal investment accounts. Both the letter and the survey solicited financial contributions for NTU. The mailing was marked, "OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY COMMISSIONED BY THE NATIONAL TAXPAYERS UNION FOR THE SOCIAL SECURITY **[**3]** ADMINISTRATION, WHITE HOUSE AND CONGRESS OF THE UNITED STATES." The enclosed survey was titled, "OFFICIAL SURVEY ON SOCIAL SECURITY."

[*241] The Social Security Administration ("SSA") advised NTU that its mailing violated *§ 1140* of the *Social Security Act. Section 1140* prohibits the use of the words "Social Security" or certain related words in connection with any advertisement, solicitation, or other communication in a manner that conveys or could reasonably be construed as conveying the false impression that such advertisement or solicitation is approved, endorsed, or authorized by the SSA or other government agencies. *42 U.S.C. § 1320b-10(a)(1).* The SSA requested that NTU cease distribution of its surveys.

NTU initially indicated that it would change the design of its mailing to comply with the statute. The revised mailing contained the following language: "OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY CONDUCTED BY THE NATIONAL TAXPAYERS UNION AND COMMISSIONED FOR THE WHITE HOUSE[,] UNITED STATES HOUSE OF REPRESENTATIVES [AND] UNITED STATES SENATE" The survey title, "OFFICIAL SURVEY ON SOCIAL SECURITY," remained unchanged.

After the SSA expressed its **[**4]** dissatisfaction with NTU's revised mailing and threatened enforcement action, NTU filed this lawsuit against the SSA in the district court. NTU alleged that *§ 1140* is facially invalid because it is unconstitutionally overbroad; *§ 1140* is unconstitutional as applied to NTU's revised mailing, which contains only legitimate, truthful representations; and the SSA's threat of enforcement amounts to a prior restraint of protected speech.

The district court granted the SSA's motion to dismiss the complaint. First, the court ruled that it lacked jurisdiction to consider NTU's pre-enforcement challenge to the constitutionality of *§ 1140*. Relying on *Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 127 L. Ed. 2d 29, 114 S. Ct. 771 (1994)*, the district court held that the administrative review procedures described in the relevant statutes are the exclusive means for attacking *§ 1140* prior to its actual enforcement against NTU. The district court then dismissed NTU's prior restraint claim on the ground that the SSA's threatening enforcement action through administrative procedures

was not so burdensome as to amount to a prior restraint. This appeal followed. n1

> n1 On appeal, NTU argues only that the district court erred by dismissing its constitutional challenge to § *1140*. NTU does not seek to revive its prior restraint claim, and we do not address that claim here.

[5]**

II.

We review *de novo* the district court's dismissal of NTU's complaint for lack of subject-matter jurisdiction. *See Columbia Gas Transmission Corp. v. Drain, 237 F.3d 366, 369 (4th Cir. 2001)*. "In cases involving delayed judicial review of final agency actions, we shall find that Congress has allocated initial review to an administrative body where such intent is 'fairly discernible in the statutory scheme.'" *Thunder Basin, 510 U.S. at 207* (quoting *Block* v. *Community Nutrition Inst., 467 U.S. 340, 351, 81 L. Ed. 2d 270, 104 S. Ct. 2450 (1984)*). In determining whether Congress intended to preclude initial judicial review in this instance, we consider "the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful judicial review." *Id.*

A.

The Supreme Court held in *Thunder Basin* that a district court lacks subject-matter **[*242]** jurisdiction to entertain pre-enforcement challenges to the Mine

Safety and Health Amendments Act of 1977, *30 U.S.C. § 801 et seq.* ("Mine Act"). *510 U.S. at 202, 208.* First, the Court noted that the statute "establishes **[**6]** a detailed structure for reviewing violations of any mandatory health or safety standard, rule, order, or regulation promulgated under the Act." *Id at 207.* Under the Mine Act, a mine operator can challenge an adverse agency order before an administrative law judge, whose decision is reviewable by the Mine Safety and Health Review Commission. If the mine operator is dissatisfied with the Commission's ruling, it can challenge that ruling in the appropriate court of appeals, which has exclusive jurisdiction over such cases. *Id. at 207-08.* Moreover, while the Mine Act expressly authorizes district court jurisdiction over actions *by the Secretary of Labor* to enjoin habitual violations, it does not confer jurisdiction over actions *by mine operators* complaining about agency actions. *Id at 209.*

Second, the Court concluded that the legislative history of the Mine Act suggests that "Congress intended to direct ordinary challenges under the Mine Act to a single review process." *Id. at 211.* This legislative history indicated that "enforcement was hobbled by a cumbersome review process" under the predecessor statute **[**7]** and that Congress expressly rejected a proposal for *de novo* review of agency actions in the district courts. *Id.*

Third, the Court concluded that the claims asserted in the complaint fell within the class of claims that Congress intended to be adjudicated within the review process described by the statute. *Thunder Basin,*

510 U.S. at 212. Thunder Basin's statutory claims fell squarely within the agency's expertise, and its constitutional due process claim could be decided by the Commission. *Id. at 214-15.* In any event, the Court noted that Thunder Basin's statutory and constitutional claims could be "meaningfully addressed in the court of appeals." *Id. at 215.*

B.

The statutory scheme at issue here resembles the Mine Act scheme in all relevant respects, and it too "establishes a detailed structure for reviewing violations" of the statute. *Thunder Basin, 510 U.S. at 207. Section 1140* authorizes the SSA to impose civil monetary penalties of up to $ 5,000 (or $ 25,000 in the case of a broadcast or telecast) per violation against any person who misuses the phrase "Social Security" in violation of the statute. **[**8]** *42 U.S.C. § 1320b-10(b), (d). Section 1140* further provides a detailed procedure for assessment and review of such penalties. *Id. § 1320b-10(c)(1)* (incorporating most of the provisions of *42 U.S.C. § 1320a-7(a),* which governs civil monetary penalties with respect to other violations concerning Social Security).

Under this procedure, the SSA may initiate an enforcement action within six years of the alleged violation by serving notice of such action as required by the Federal Rules of Civil Procedure. *42 U.S.C. § 1320a-7a(c)(1).* The alleged violator is guaranteed an opportunity to be heard, with the right to be represented by counsel and the right to present and cross-examine witnesses. *Id. § 1320a-7a(c)(2).* Any party

aggrieved by the ruling of the agency may petition the appropriate court of appeals to review that ruling; upon the filing of the record, the jurisdiction of the court of appeals is exclusive. *Id. § 1320a-7a(e).*

[*243] Like the Mine Act, the statute here makes no distinction between pre-enforcement and post-enforcement claims. *See Thunder Basin, 510 U.S. at 208-09.* **[**9]** Also like the Mine Act, the statute here specifically authorizes district courts to exercise jurisdiction over certain actions brought by the agency *but not* by private parties. *42 U.S.C. § 1320b-10(c)(2); 42 U.S.C. § 1320a-7a(k).* Thus, the text and structure of *§ 1140* indicate Congress' intention that challenges to that statute be adjudicated, at least initially, in the administrative review process. *Cf. Sturm, Ruger & Co., Inc. v. Chao, 353 U.S. App. D.C. 245, 300 F.3d 867, 873 (D.C. Cir. 2002) (OSHA); Great Plains Coop v. CFTC, 205 F.3d 353, 355 (8th Cir. 2000)* (Commodity Exchange Act); *Northeast Erectors Ass'n of BTE4 v. Secretary of Labor, 62 F.3d 37, 39-40 (1st Cir. 1995)* (OSHA).

The Court in *Thunder Basin* consulted the legislative history of the Mine Act to confirm the conclusion it drew from the text and structure of the statute. n2 Although there is scant legislative history to consider specifically with respect to the substance of *§ 1140,* the legislative history underlying the civil monetary penalties provision (incorporated by *§ 1140*) shows that Congress **[**10]** specifically rejected a proposal allowing alleged violators to challenge final agency actions in trials *de novo* in district court. *See* Pub. L. No. 97-35, § 2105 (codified at *42 U.S.C. § 1320a-7a);* H.R. Conf. Rep. No. 97-208, at 950 (1981), *reprinted in*

1981 U.S.C.C.A.N. 1010, 1312. This legislative history is similar to that in *Thunder Basin* and likewise suggests that Congress intended pre-enforcement challenges to *§ 1140* to be adjudicated in the first instance by the administrative agency rather than the district courts. *See 510 U.S. at 211.*

> n2 In no way did the Court suggest, as NTU now argues, that the legislative history stands on equal footing with the text and structure of the statute or that specific legislative history is necessary to conclude that Congress intended to preclude initial judicial review. The Court concluded from the text and structure of the Mine Act that Congress intended to preclude initial judicial resolution of Thunder Basin's claims; the legislative history merely "confirmed this interpretation" of the statute. *Thunder Basin, 510 US. at 207-09.*

[11]**

We further conclude that the claims asserted in this case are "of the type Congress intended to be reviewed within this statutory structure." *Thunder Basin, 510 U.S. at 212.* The Court in *Thunder Basin* noted that it might be appropriate to bypass administrative review in cases involving "claims considered 'wholly collateral' to a statute's review provisions and outside the agency's expertise, particularly where a finding of preclusion could foreclose all meaningful judicial review" *Id. at 212-13* (internal citations omitted). Such is not the case here.

On appeal, NTU asserts only constitutional claims, attacking the substantive provision of *§ 1140* - the prohibition against certain uses of the phrase "Social Security" - as a violation of the *First Amendment* on its face and as applied. Although "adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies," the Court in *Thunder Basin* noted that "this rule is not mandatory" and concluded that a district court does not have jurisdiction to entertain an initial challenge to the constitutionality of the Mine Act. **[**12]** *Id at 215.* The Court seems to have rested its conclusion on the fact that the plaintiff's constitutional claim could be meaningfully addressed by the court of appeals in due course. *Id.* In this case, even if the **[*244]** administrative agency elects not to decide the constitutional claims presented by NTIS, this court can do so at the appropriate time. *See Shalala v. Illinois Council on Long Term Care, Inc., 529 U.S. 1, 23-24, 146 L. Ed. 2d 1, 120 S. Ct. 1084 (2000)* (citing *Thunder Basin* for the proposition that a court reviewing an agency determination "has adequate authority to resolve any statutory or constitutional contention that the agency does not, or cannot, decide"); *Virginia v. United States, 74 F.3d 517, 523 (4th Cir. 1996)* (citing *Thunder Basin* for the proposition that "there is simply no impediment to the adjudication of constitutional issues through petitions for direct review of final agency action in the circuit courts"). n3

n3 This is not a case in which the plaintiff challenges the validity of the agency's enabling statute in an action wholly independent of the agency's enforcement of a substantive provision.

See, e.g, Time Warner Entm't Co., L.P. v. FCC, 320 U.S. App. D.C 294, 93 F.3d 957 (D.C. Cir. 1996) (noting that the plaintiffs challenge to certain statutory provisions was "entirely independent of any agency proceedings, whether actual or prospective"). Rather, NTU brought this action in anticipation of imminent enforcement proceedings, and its arguments amount to defenses to enforcement of *§ 1140*. Nor is this a case in which permitting the constitutional challenge in district court would be consistent with other statutory provisions authorizing suits in district court. *See, e.g., Action for Children's Television v. FCC, 313 U.S. App. D.C. 261, 59 F.3d 1249 (D.C. Cir. 1995)* (permitting the plaintiff to bypass administrative review where the relevant statute authorized suits in district court to collect on a forfeiture order, such that the plaintiffs challenging the constitutionality of the *forfeiture statute* in defense against such a collection action was entirely consistent with the statutory scheme). NTU's challenge is aimed at the substantive provision of *§ 1140* - the prohibition against certain uses of the phrase "Social Security" - not the SSA's authority to impose civil monetary penalties for violation of that provision. In sum, NTU's complaint represents an impermissible attempt to evade the administrative review scheme established by Congress. *Cf. Thunder Basin, 510 U.S. at 216; AFGE v. Loy, 367 F.3d 932, 936 (D.C. Cir. 2004); Sturm, Ruger, 300 F.3d at 876; Great Plains Coop, 205 F.3d at 354-55; Northeast Erectors, 62 F.3d at 40.*

[13]**

"The limitation imposed here is channeling of initial review through the administrative process, not exclusion of judicial supervision." *Eastern Bridge, LLC v. Chao, 320 F.3d 84, 90 (1st Cir. 2003).* NTU's constitutional claims are of the type Congress intended to be adjudicated in the statutory review process, and that process will give NTU a meaningful opportunity to litigate its constitutional challenge to *§ 1140.* Accordingly, we conclude that NTU's claims must be adjudicated initially under the administrative review scheme established by Congress in the statute.

III.

Because the administrative review procedures available here are nearly indistinguishable from those at issue in *Thunder Basin,* and because the claims asserted here are of the type Congress intended to be adjudicated, at least initially, through the administrative review scheme, the district court properly ruled that it lacked subject-matter jurisdiction over this case. The decision of the district court is therefore

AFFIRMED.

CONCURBY: WILKINSON

CONCUR: WILKINSON, Circuit Judge, concurring:

We do not have before us a pre-enforcement challenge to a statute that seeks to silence criticism of

[14]** the operation of a government program. All that is at issue is a statute that forbids the impersonation of a federal agency by a private organization bent on sowing confusion among beneficiaries of a program and thereby thwarting the purposes it was intended to serve. In this context, Congress had unquestionable authority to adopt the administrative procedures that it did. *Compare Mathews v.* **[*245]** *Eldridge, 424 U.S. 319, 331 n. 11, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976)* (emphasizing that the "nature of the claim being asserted and the consequences of deferment of judicial review" will often bear on whether district court jurisdiction is proper prior to final agency disposition).

I am thus happy to concur in Judge Shedd's fine opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

NATIONAL TAXPAYER UNION	:	
	:	
v.	:	Civil Action
	:	WMN-02-3949
UNITED STATES SOCIAL SECURITY ADMINISTRATION, et al.	:	

[ENTERED: September 3, 2003]

MEMORANDUM

Plaintiff filed this action challenging the constitutionality of § 1140 of the Social Security Act, 42 U.S.C. § 1320b-10, a statute that limits the use of certain federal agency names and programs in solicitations and other communications. In the Complaint, Plaintiff asserts that § 1140 is unconstitutional on its face (Count I) and as applied (Count II), and also argues that the Social Security Administration's Office of the Inspector General's (OIG's) request for pre-publication submissions of Plaintiff's mailings, coupled with the threat of significant civil penalties, constitutes a prior restraint of speech (Count III). Defendants have filed a motion to dismiss the complaint Pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. Paper No. 5. Defendants argue that this Court lacks jurisdiction over Plaintiff's pre-enforcement challenge to the statute, and that Plaintiff's prior restraint count fails to state a claim upon which relief can be granted. Upon review of the

pleadings and the applicable case law, the Court finds that no hearing is required and that Defendants' motion should be granted.[1]

I. FACTUAL BACKGROUND

Plaintiff describes itself as an "organization which engages in grassroots education, research and lobbying on issues of importance to taxpayers in the United States." Complaint at ¶ 1. One of its current areas of activity is the reform of the Social Security system. As part of Plaintiff's efforts in that regard, it began mailing, in early 2002, surveys about various aspects of the Social Security system. These surveys also solicited funds. Plaintiff's mailings were sent out in envelopes marked, "OFFICIAL NATIONAL SURVEY ON SOCIAL SECURITY COMMISSIONED BY THE NATIONAL TAXPAYERS UNION FOR THE SOCIAL SECURITY ADMINISTRATION, WHITE HOUSE AND CONGRESS OF THE UNITED STATES." The surveys inside the envelope repeated that these were "OFFICIAL SURVEY(S) ON SOCIAL SECURITY."

On April 3, 2002, the OIG sent Plaintiff a notice that it had determined that this survey violated § 1140 of the Social Security Act. Section 1140 prohibits the use of the words "Social Security" or related words, acronyms, emblems and symbols in connection with

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[1] Plaintiff has also filed a cross motion for partial summary judgment, arguing that it is entitled to judgment as a matter of law as to Counts I and II of the Complaint. Paper No. 11. Because the Court finds that it lacks subject matter jurisdiction over those claims, Plaintiff's motion will be denied as moot.

any advertisement, solicitation or other communication "in a manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that such item is approved, enforced or authorized by the Social Security Administration." 42 U.S.C. § 1320b-10(a). The OIG's letter requested that Plaintiff cease such prohibited use.

Plaintiff responded on April 12, 2002, indicating that it would voluntarily change the design of its survey and solicitation to comply with the statute. In September 2002, however, the OIG received another copy of a survey distributed by Plaintiff that, in the OIG's view, contained essentially the same violative language. The OIG sent Plaintiff another letter informing that it found the revised survey still in violation of § 1140, and requested written confirmation that Plaintiff would voluntarily comply with the statute. The letter also stated that if such confirmation were not received within 10 days, the OIG would commence a formal enforcement action. Plaintiff responded with a letter stating that it viewed § 1140 unconstitutional as applied, and that it would not provide a written confirmation of compliance. Shortly thereafter, Plaintiff filed the instant suit.

II. DISCUSSION

A. Jurisdiction over Pre-enforcement Challenges

Section 1140 authorizes the SSA to impose civil monetary penalties on those that violate its provisions.

If the violation involves printed material, each violation is subject to a penalty of up to $5,000. In the case of mass mailings, each individual piece of mail can be considered a separate violation. 42 U.S.C. § 1320b-10(b). Enforcement of these provisions is through the OIG. 42 U.S.C. § 1320b(d).

The statute, in conjunction with its implementing regulations, see 20 C.F.R. §§ 498.100-498.224, also provides a comprehensive administrative process for the assessment of penalties, and the review of those assessments. Briefly summarized, this process provides the alleged violator, or "respondent," with notice, the opportunity for a full evidentiary hearing before an Administrative Law Judge, the right to appeal the ALJ's decision to the Departmental Appeals Board of the United States Department of Health and Human Services, and ultimately, the right to appeal any final adverse penalty determination to the federal courts of appeals.

In Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994), the Supreme Court set out the standard for determining whether a district court could assume jurisdiction over a pre-enforcement challenge to an agency's action where a statutory administrative procedure had been established. The Court instructed:

> [i]n cases involving delayed judicial review of agency actions, we shall find that Congress has allocated initial review to an administrative body where such intent is "fairly discernible in the statutory scheme." Whether a statute is

> intended to preclude initial judicial review is determined from the statute's language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful review.

510 U.S. at 207 (quoting Block v. Community Nutrition Institute, 467 U.S. 340, 351 (1984)).

Thunder Basin arose out of a coal mine operator's challenge to the actions of a federal Mine Safety and Health Administration (MSHA) official, who had instructed the operator to post certain information in accordance with regulations promulgated under the Federal Mine Safety and Health Amendments Act of 1977. Rather than waiting for the MSHA to issue a citation, and then challenging the agency's action through the administrative procedure provided for in the Act, the mine operator sought injunctive relief in a federal district court. The district court issued a preliminary injunction, but the Tenth Circuit Court of Appeals reversed that decision, concluding that the district court was without jurisdiction. The Supreme Court affirmed the decision of the Tenth Circuit, holding that "the statutory review scheme in the Federal Mine Safety and Health Amendments Act of 1977 prevents a district court from exercising subject matter jurisdiction over a pre-enforcement challenge to the Act." Id. at 202.

Applying its test for determining Congress' intent, the Supreme Court first noted that the Mine Act "establishe[d] a detailed structure for reviewing

violations of any mandatory health or safety standard, rule, order, or regulation promulgated under the Act." Id. at 207 (internal quotations omitted). The Court pointed to several factors in support of this argument. The Mine Act specified a time period of thirty days during which a mine operator could challenge any citation, directed that all challenges be heard by an ALJ, established the Federal Mine Safety and Health Review Commission (FMSHRC) to review the ALJ's decisions, invested the sole power to impose penalties for violations of the Act in the FMSHRC, and granted mine operators the right to appeal adverse FMSHRC rulings to the appropriate federal court of appeals. Id. at 207-08. Moreover, the Court noted that the Act did not "distinguish between preenforcement and postenforcement challenges, but applie[d] to all violations of the Act and its regulations." Id. at 208-09. Significantly, the Mine Act expressly authorized district court jurisdiction in only two instances--both of which could be initiated only by the agency, not by a mine operator. Id. at 209.

The Court also looked to the legislative history of the Mine Act to support its holding that initial judicial review of the agency's action in the district court was precluded. In particular, the Court observed that the Mine Act attempted to correct a system in which civil penalties for safety violations in United States mines "were not always mandatory and were too low to compel compliance, and enforcement was hobbled by a cumbersome review process. Congress expressed particular concern that under the previous Coal Act, mine operators could contest civil-penalty assessments de novo in federal district court once the

administrative review process was complete, thereby seriously hampering the collection of civil penalties." Id. at 209-10 (internal quotations omitted). The Court concluded that the legislative history was "persuasive evidence that Congress intended to direct ordinary challenges under the Mine Act to a single review process." Id. at 211.

Finally, the Court concluded that the plaintiff's claims could be afforded "meaningful review" through the administrative process established under the Mine Act, for plaintiff's claims were within the scope of the statute's review provisions and the agency's expertise, and they could be meaningfully addressed by the Court of Appeals. See id. at 212-15.

Applying this same three part test to the provisions of § 1140, and the regulatory scheme promulgated thereunder, this Court concludes that it is without jurisdiction to hear Plaintiff's pre-enforcement challenges to the statute. First, the Court finds that the language, structure, and purpose of § 1140 support a holding that the administrative process is the exclusive remedy for claims challenging the statute. The review scheme established for the enforcement of § 1140 is very similar to that considered in Thunder Basin. Both statutes: specify the time and procedures for contesting an agency enforcement action; refer all such contests to an ALJ for an evidentiary hearing; and, grant an appeal of any adverse rulings, first to a designated intermediate body, and then to a federal circuit court appeals. Furthermore, § 1140, like the Mine Act, authorizes original actions in the district courts in a finite number of situations, but only to be initiated by

the agency, and not by the respondent. See 42 U.S.C. § 1320a-7a(k) and 1320b-10(c)(2)

The legislative history of § 1140, while somewhat scant, is also consistent with a congressional intent to limit judicial review of § 1140 violations to the review of final determinations in the courts of appeals. This legislation was passed to address a pattern of deceptive advertising that was targeted to senior citizens. Advertisers produced mailings that were designed so that they appeared to be official notices from the federal government in order to lure seniors into making (and paying for) useless calls to "1-900" telephone numbers, or into paying for services that could be accomplished for free or at a minimal cost by dealing directly with the SSA. See Committee on House Ways and Means, Subcommittees on Oversight and on Social Security, Deceptive Solicitations (Comm. Print 1992) at 3-5. Congress concluded that these practices not only harmed vulnerable senior citizens, but also "potentially interfere[] with the ability of the Government to effectively correspond with the public and increase[] the likelihood that true Government mailings will be destroyed without being opened." Id. at 5.

In 1994, § 1140 was amended to remedy what was perceived as weaknesses in its enforcement provisions. An annual $10,000 cap on penalties was eliminated in response to concerns that a $10,000 penalty "did not serve as an adequate deterrent to groups who can take in millions of dollars each year by engaging in deceptive practices." H.R. Rep. No. 103-506, 103rd Cong. 2nd Sess. 71 (1994), reprinted in 1994

U.S.C.C.A.N. 1494, 1524. The amendment also repealed a requirement that the Department of Health and Human Services obtain a formal declination from the Department of Justice before pursuing penalties under § 1140. Congress found that this requirement had unnecessarily delayed the assessment of penalties. Id. at 1525.

The Court also concludes that Plaintiff's claims are "of the type Congress intended to be reviewed within this statutory structure," and can be afforded meaningful review through that process. Thunder Basin, 510 U.S. at 212. In similar contexts, courts have consistently held that both "as applied," as well as "facial" constitutional pre-enforcement challenges must be resolved through the administrative process, with judicial review only in the circuit courts. See Thunder Basin; Sturm, Ruger & Co. v Chao, 300 F.3d 867 (2002) (holding that district court had no subject matter jurisdiction over Fourth Amendment privacy interest challenge to data collection initiative of Occupational Safety and Health Administration, and that plaintiff must pursue claim through administrative review process prescribed by Occupational Safety and Health Act); Virginia v. United States, 74 F.3d 517 (4th Cir. 1996) (holding that the plaintiff could not evade the judicial review provision of the Clean Air Act by casting its complaint as a constitutional attack on the Act itself); Southern Pines Assoc. v. United States, 912 F.2d 713, 717 (4th Cir. 1990) (affirming district court's dismissal of pre-enforcement due process challenge to the Clean Water Act); General Electric Co. v. Whitman, 257 F.Supp.2d 8, 28 (D.D.C. 2003) (observing that "whether a statute precludes or delays judicial review

of a particular claim should not turn on some artificial or clever distinction put forth by the party attempting evade the statute's judicial review limitation – whether constitutional versus statutory, facial versus as-applied, or procedural versus substantive"). Here, Plaintiff makes no claim that it would be precluded from raising its constitutional challenges before the appropriate circuit court.

In arguing that it should be afforded pre-enforcement judicial review, Plaintiff relies primarily on the Supreme Court decision Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). In Abbott, The Supreme Court did hold that statutory review of certain provisions of the Food, Drug, and Cosmetic Act did not preclude district court jurisdiction over a pre-enforcement challenge to regulations promulgated under separate provisions of that act. It did so, however, only after finding that the presence of a statutory savings clause and the statute's legislative history demonstrated, "rather conclusively that the specific review provisions were designed to give an additional remedy and not to cut down more traditional channels of review." 387 U.S. at 142. Although Plaintiff identifies Abbott Laboratories as the "seminal case" in the area of pre-enforcement challenges, it offers no argument as to how § 1140 might be similar to the statute at issue in that decision.[2]

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[2] Plaintiff also relies on Commodity Trend Service v. Commodity Futures Trading Comm'n, 233 F.3d 981 (7th Cir. 2000). In Commodity Trend, however, the issue was ripeness, not statutory preclusion of district court jurisdiction.

Plaintiff also argues that preclusion in this instance is inappropriate because "the escalating nature of the fines which the agency can impose on a per-mail-piece basis," is requiring Plaintiff to "self-censor." Opp. at 6. The Supreme Court rejected a similar argument in Thunder Basin, noting that "although the Act's civil penalties unquestionably may become onerous if petitioner chooses not to comply, the Secretary's penalty assessments become final and payable only after full review by the Commission and the appropriate court of appeals." 510 U.S. at 218; see also Strum, Ruger, 300 F.3d at 252 (noting that one wishing to challenge the statute can refuse to comply, "draw a citation from OSHA, and then contest the citation through the statutory review procedures that ultimately ends in a court of appeals").

For these reasons, the Court finds that Plaintiff's facial and as applied constitutional challenges must be dismissed as this Court has no jurisdiction over those claims.

B. Prior Restraints of Speech

In moving to dismiss Plaintiff's prior restraint claim, Defendants again rely on Thunder Basin, observing that, like Thunder Basin, "this as not a situation where compliance is so burdensome and the threat of penalties so potent that a constitutionally intolerable choice is presented." Motion at 33. To bring its mailing into compliance, Defendants have indicated that Plaintiff would need to do no more than identify its mailing as "NTU's Official National Survey on Social Security," as opposed to "Official National

Survey on Social Security." As to the scope of potential penalties, Defendants note that while Congress repealed the $10,000 cap, that repeal certainly does not mandate the imposition of the maximum penalties allowed under the statute. Any penalties assessed must still be reasonable, and the agency is required to take into account such factors as the nature and circumstances of the communication, the degree of culpability, the history of prior offenses, and the financial condition of the respondent. See 42 U.S.C. § 1320a-7a(d). Defendants also note that proposed penalties do not become final and payable until the agency makes a final decision, and the regulations include provisions for a stay of the effective date of any penalty pending appeal. See 20 U.S.C. § 498.223. In its meager opposition, Plaintiff does not respond directly to any of these arguments.

The Court concludes that the complaint does not state a claim for an unlawful prior restraint of speech.

III. CONCLUSION

For the reasons stated above, the Court concludes that Defendants' motion should be granted, and the complaint dismissed. A separate order will issue.

/s/ William M. Nickerson
William M Nickerson
Senior United States District Judge

Dated: September 3, 2003

TITLE 42 > CHAPTER 7 > SUBCHAPTER XI > Part A > Sec. 1320a-7a.

Sec. 1320a-7a. - Civil monetary penalties

(a) Improperly filed claims

Any person (including an organization, agency, or other entity, but excluding a beneficiary, as defined in subsection (i)(5) of this section) that -

(1)

knowingly presents or causes to be presented to an officer, employee, or agent of the United States, or of any department or agency thereof, or of any State agency (as defined in subsection (i)(1) of this section), a claim (as defined in subsection (i)(2) of this section) that the Secretary determines -

(A)

is for a medical or other item or service that the person knows or should know was not provided as claimed, including any person who engages in a pattern or practice of presenting or causing to be presented a claim for an item or service that is based on a code that the person knows or should know will result in a greater payment to the person than the code the person knows or should know is applicable to the item or service actually provided,

(B)

is for a medical or other item or service and the person knows or should know the claim is false or fraudulent,

(C)

is presented for a physician's service (or an item or service incident to a physician's service) by a person who knows or should know that the individual who furnished (or supervised the furnishing of) the service -

(i)

was not licensed as a physician,

(ii)

was licensed as a physician, but such license had been obtained through a misrepresentation of material fact (including cheating on an examination required for licensing); or

(iii)

represented to the patient at the time the service was furnished that the physician was certified in a medical specialty by a medical specialty board when the individual was not so certified,

(D)

is for a medical or other item or service furnished during a period in which the person was excluded from the program under which the claim was made pursuant to a determination by the Secretary under this section or under section 1320a-7, 1320c-5, 1320c-9(b) (as in effect on September 2, 1982), 1395y(d) (as in effect on August 18, 1987), or 1395cc(b) of this title or as a result of the application of the provisions of section 1395u(j)(2) of this title, or

(E)

is for a pattern of medical or other items or services that a person knows or should know are not medically necessary;

(2)

knowingly presents or causes to be presented to any person a request for payment which is in violation of the terms of

(A)

an assignment under section 1395u(b)(3)(B)(ii) of this title, or

(B)

an agreement with a State agency (or other requirement of a State plan under

subchapter XIX of this chapter) not to charge a person for an item or service in excess of the amount permitted to be charged, or

(C)

an agreement to be a participating physician or supplier under section 1395u(h)(1) of this title, or

(D)

an agreement pursuant to section 1395cc(a)(1)(G) of this title;

(3)

knowingly gives or causes to be given to any person, with respect to coverage under subchapter XVIII of this chapter of inpatient hospital services subject to the provisions of section 1395ww of this title, information that he knows or should know is false or misleading, and that could reasonably be expected to influence the decision when to discharge such person or another individual from the hospital;

(4)

in the case of a person who is not an organization, agency, or other entity, is excluded from participating in a program under subchapter XVIII of this chapter or a State health care program in accordance with this subsection

or under section 1320a-7 of this title and who, at the time of a violation of this subsection -

(A)

retains a direct or indirect ownership or control interest in an entity that is participating in a program under subchapter XVIII of this chapter or a State health care program, and who knows or should know of the action constituting the basis for the exclusion; or

(B)

is an officer or managing employee (as defined in section 1320a-5(b) of this title) of such an entity;

(5)

offers to or transfers remuneration to any individual eligible for benefits under subchapter XVIII of this chapter, or under a State health care program (as defined in section 1320a-7(h) of this title) that such person knows or should know is likely to influence such individual to order or receive from a particular provider, practitioner, or supplier any item or service for which payment may be made, in whole or in part, under subchapter XVIII of this chapter, or a State health care program (as so defined);

(6)

arranges or contracts (by employment or otherwise) with an individual or entity that the person knows or should know is excluded from participation in a Federal health care program (as defined in section 1320a-7b(f) of this title), for the provision of items or services for which payment may be made under such a program; or

(7)

commits an act described in paragraph (1) or (2) of section 1320a-7b(b) of this title;

shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty of not more than $10,000 for each item or service (or, in cases under paragraph (3), $15,000 for each individual with respect to whom false or misleading information was given; in cases under paragraph (4), $10,000 for each day the prohibited relationship occurs; or in cases under paragraph (7), $50,000 for each such act). In addition, such a person shall be subject to an assessment of not more than 3 times the amount claimed for each such item or service in lieu of damages sustained by the United States or a State agency because of such claim (or, in cases under paragraph (7), damages of not more than 3 times the total amount of remuneration offered, paid, solicited, or received, without regard to whether a portion of such remuneration was offered, paid,

solicited, or received for a lawful purpose). In addition the Secretary may make a determination in the same proceeding to exclude the person from participation in the Federal health care programs (as defined in section 1320a-7b(f)(1) of this title) and to direct the appropriate State agency to exclude the person from participation in any State health care program.

(b) Payments to induce reduction or limitation of services

(1)

If a hospital or a critical access hospital knowingly makes a payment, directly or indirectly, to a physician as an inducement to reduce or limit services provided with respect to individuals who -

(A)

are entitled to benefits under part A or part B of subchapter XVIII of this chapter or to medical assistance under a State plan approved under subchapter XIX of this chapter, and

(B)

are under the direct care of the physician,

the hospital or a critical access hospital shall be subject, in addition to any other penalties that may

be prescribed by law, to a civil money penalty of not more than $2,000 for each such individual with respect to whom the payment is made.

(2)

Any physician who knowingly accepts receipt of a payment described in paragraph (1) shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty of not more than $2,000 for each individual described in such paragraph with respect to whom the payment is made.

(3)

(A)

Any physician who executes a document described in subparagraph (B) with respect to an individual knowing that all of the requirements referred to in such subparagraph are not met with respect to the individual shall be subject to a civil monetary penalty of not more than the greater of –

(i)

$5,000, or

(ii)

three times the amount of the payments under subchapter XVIII of this

chapter for home health services which are made pursuant to such certification.

(B)

A document described in this subparagraph is any document that certifies, for purposes of subchapter XVIII of this chapter, that an individual meets the requirements of section 1395f(a)(2)(C) or 1395n(a)(2)(A) of this title in the case of home health services furnished to the individual.

(c) Initiation of proceeding; authorization by Attorney General, notice, etc., estoppel, failure to comply with order or procedure

(1)

The Secretary may initiate a proceeding to determine whether to impose a civil money penalty, assessment, or exclusion under subsection (a) or (b) of this section only as authorized by the Attorney General pursuant to procedures agreed upon by them. The Secretary may not initiate an action under this section with respect to any claim, request for payment, or other occurrence described in this section later than six years after the date the claim was presented, the request for payment was made, or the occurrence took place. The Secretary may initiate an action under this section by serving notice of the action in any manner authorized by Rule 4 of the Federal Rules of Civil Procedure.

(2)

The Secretary shall not make a determination adverse to any person under subsection (a) or (b) of this section until the person has been given written notice and an opportunity for the determination to be made on the record after a hearing at which the person is entitled to be represented by counsel, to present witnesses, and to cross-examine witnesses against the person.

(3)

In a proceeding under subsection (a) or (b) of this section which –

(A)

is against a person who has been convicted (whether upon a verdict after trial or upon a plea of guilty or nolo contendere) of a Federal crime charging fraud or false statements, and

(B)

involves the same transaction as in the criminal action,

the person is estopped from denying the essential elements of the criminal offense.

(4)

The official conducting a hearing under this section may sanction a person, including any party or attorney, for failing to comply with an order or procedure, failing to defend an action, or other misconduct as would interfere with the speedy, orderly, or fair conduct of the hearing. Such sanction shall reasonably relate to the severity and nature of the failure or misconduct. Such sanction may include -

(A)

in the case of refusal to provide or permit discovery, drawing negative factual inferences or treating such refusal as an admission by deeming the matter, or certain facts, to be established,

(B)

prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense,

(C)

striking pleadings, in whole or in part,

(D)

staying the proceedings,

(E)

dismissal of the action,

(F)

entering a default judgment,

(G)

ordering the party or attorney to pay attorneys' fees and other costs caused by the failure or misconduct, and

(H)

refusing to consider any motion or other action which is not filed in a timely manner.

(d) Amount or scope of penalty, assessment, or exclusion

In determining the amount or scope of any penalty, assessment, or exclusion imposed pursuant to subsection (a) or (b) of this section, the Secretary shall take into account -

(1)

the nature of claims and the circumstances under which they were presented,

(2)

the degree of culpability, history of prior offenses, and financial condition of the person presenting the claims, and

(3)

such other matters as justice may require.

(e) Review by courts of appeals

Any person adversely affected by a determination of the Secretary under this section may obtain a review of such determination in the United States Court of Appeals for the circuit in which the person resides, or in which the claim was presented, by filing in such court (within sixty days following the date the person is notified of the Secretary's determination) a written petition requesting that the determination be modified or set aside. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the Court[1] the record in the proceeding as provided in section 2112, of title 28. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, remanding for further consideration, or setting aside, in whole or in part, the determination of the Secretary and enforcing the same to the extent that such order is

affirmed or modified. No objection that has not been urged before the Secretary shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Secretary with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be made a part of the record. The Secretary may modify his findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and he shall file with the court such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and his recommendations, if any, for the modification or setting aside of his original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of title 28.

(f) Compromise of penalties and assessments; recovery; use of funds recovered

Civil money penalties and assessments imposed under this section may be compromised by the Secretary and may be recovered in a civil action in the name of the United States brought in United States district court for the district where the claim was presented, or where the claimant resides, as determined by the Secretary. Amounts recovered under this section shall be paid to the Secretary and disposed of as follows:

(1)

(A)

In the case of amounts recovered arising out of a claim under subchapter XIX of this chapter, there shall be paid to the State agency an amount bearing the same proportion to the total amount recovered as the State's share of the amount paid by the State agency for such claim bears to the total amount paid for such claim.

(B)

In the case of amounts recovered arising out of a claim under an allotment to a State under subchapter V of this chapter, there shall be paid to the State agency an amount equal to three-sevenths of the amount recovered.

(2)

Such portion of the amounts recovered as is determined to have been paid out of the trust funds under sections 1395i and 1395t of this title shall be repaid to such trust funds.

(3)

With respect to amounts recovered arising out of a claim under a Federal health care program (as defined in section 1320a-7b(f) of this title), the portion of such amounts as is determined to have been paid by the program shall be repaid to the program, and the portion of such amounts attributable to the amounts recovered under this section by reason of the amendments made by the Health Insurance Portability and Accountability Act of 1996 (as estimated by the Secretary) shall be deposited into the Federal Hospital Insurance Trust Fund pursuant to section 1395i(k)(2)(C) of this title.

(4)

The remainder of the amounts recovered shall be deposited as miscellaneous receipts of the Treasury of the United States.

The amount of such penalty or assessment, when finally determined, or the amount agreed upon in compromise, may be deducted from any sum then or later owing by the United States or a

State agency to the person against whom the penalty or assessment has been assessed.

(g) Finality of determination respecting penalty, assessment, or exclusion

A determination by the Secretary to impose a penalty, assessment, or exclusion under subsection (a) or (b) of this section shall be final upon the expiration of the sixty-day period referred to in subsection (e) of this section. Matters that were raised or that could have been raised in a hearing before the Secretary or in an appeal pursuant to subsection (e) of this section may not be raised as a defense to a civil action by the United States to collect a penalty, assessment, or exclusion assessed under this section.

(h) Notification of appropriate entities of finality of determination

Whenever the Secretary's determination to impose a penalty, assessment, or exclusion under subsection (a) or (b) of this section becomes final, he shall notify the appropriate State or local medical or professional organization, the appropriate State agency or agencies administering or supervising the administration of State health care programs (as defined in section 1320a-7(h) of this title), and the appropriate utilization and quality control peer review organization, and the appropriate State or local licensing agency or organization (including the agency specified in section 1395aa(a) and 1396a(a)(33) of this title) that such a penalty,

assessment, or exclusion has become final and the reasons therefor.

(i) Definitions

For the purposes of this section:

(1)

The term "State agency" means the agency established or designated to administer or supervise the administration of the State plan under subchapter XIX of this chapter or designated to administer the State's program under subchapter V of this chapter or subchapter XX of this chapter.

(2)

The term "claim" means an application for payments for items and services under a Federal health care program (as defined in section 1320a-7b(f) of this title).

(3)

The term "item or service" includes

(A)

any particular item, device, medical supply, or service claimed to have been provided to a patient and listed in an itemized claim for payment, and

(B)

in the case of a claim based on costs, any entry in the cost report, books of account or other documents supporting such claim.

(4)

The term "agency of the United States" includes any contractor acting as a fiscal intermediary, carrier, or fiscal agent or any other claims processing agent for a Federal health care program (as so defined).

(5)

The term "beneficiary" means an individual who is eligible to receive items or services for which payment may be made under a Federal health care program (as so defined) but does not include a provider, supplier, or practitioner.

(6)

The term "remuneration" includes the waiver of coinsurance and deductible amounts (or any part thereof), and transfers of items or services for free or for other than fair market value. The term "remuneration" does not include -

(A)

the waiver of coinsurance and deductible amounts by a person, if -

(i)

the waiver is not offered as part of any advertisement or solicitation;

(ii)

the person does not routinely waive coinsurance or deductible amounts; and

(iii)

the person –

(I)

waives the coinsurance and deductible amounts after determining in good faith that the individual is in financial need; or

(II)

fails to collect coinsurance or deductible amounts after making reasonable collection efforts;

(B)

subject to subsection (n) of this section, any permissible practice described in any subparagraph of section 1320a-7b(b)(3) of this title or in regulations issued by the Secretary;

(C)

differentials in coinsurance and deductible amounts as part of a benefit plan design as long as the differentials have been disclosed in writing to all beneficiaries, third party payers, and providers, to whom claims are presented and as long as the differentials meet the standards as defined in regulations promulgated by the Secretary not later than 180 days after August 21, 1996; or

(D)

[2] incentives given to individuals to promote the delivery of preventive care as determined by the Secretary in regulations so promulgated,

(D)

[2] a reduction in the copayment amount for covered OPD services under section 1395l(t)(5)(B) (FOOTNOTE 3) of this title.

(7)

The term "should know" means that a person, with respect to information -

(A)

acts in deliberate ignorance of the truth or falsity of the information; or

(B)

acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(j) Subpoenas

(1)

The provisions of subsections (d) and (e) of section 405 of this title shall apply with respect to this section to the same extent as they are applicable with respect to subchapter II of this chapter. The Secretary may delegate the authority granted by section 405(d) of this title (as made applicable to this section) to the Inspector General of the Department of Health and Human Services for purposes of any investigation under this section.

(2)

The Secretary may delegate authority granted under this section and under section 1320a-7 of this title to the Inspector General of the Department of Health and Human Services.

(k) Injunctions

Whenever the Secretary has reason to believe that any person has engaged, is engaging, or is about to engage in any activity which makes the person subject to a civil monetary penalty under

this section, the Secretary may bring an action in an appropriate district court of the United States (or, if applicable, a United States court of any territory) to enjoin such activity, or to enjoin the person from concealing, removing, encumbering, or disposing of assets which may be required in order to pay a civil monetary penalty if any such penalty were to be imposed or to seek other appropriate relief.

(l) Liability of principal for acts of agent

A principal is liable for penalties, assessments, and an exclusion under this section for the actions of the principal's agent acting within the scope of the agency.

(m) Claims within jurisdiction of other departments or agencies

(1)

For purposes of this section, with respect to a Federal health care program not contained in this chapter, references to the Secretary in this section shall be deemed to be references to the Secretary or Administrator of the department or agency with jurisdiction over such program and references to the Inspector General of the Department of Health and Human Services in this section shall be deemed to be references to the Inspector General of the applicable department or agency.

(2)

(A)

The Secretary and Administrator of the departments and agencies referred to in paragraph (1) may include in any action pursuant to this section, claims within the jurisdiction of other Federal departments or agencies as long as the following conditions are satisfied:

(i)

The case involves primarily claims submitted to the Federal health care programs of the department or agency initiating the action.

(ii)

The Secretary or Administrator of the department or agency initiating the action gives notice and an opportunity to participate in the investigation to the Inspector General of the department or agency with primary jurisdiction over the Federal health care programs to which the claims were submitted.

(B)

If the conditions specified in subparagraph (A) are fulfilled, the Inspector General of the department or agency

initiating the action is authorized to exercise all powers granted under the Inspector General Act of 1978 (5 U.S.C. App.) with respect to the claims submitted to the other departments or agencies to the same manner and extent as provided in that Act with respect to claims submitted to such departments or agencies.

(n) Safe harbor for payment of medigap premiums

(1)

Subparagraph (B) of subsection (i)(6) of this section shall not apply to a practice described in paragraph (2) unless -

(A)

the Secretary, through the Inspector General of the Department of Health and Human Services, promulgates a rule authorizing such a practice as an exception to remuneration; and

(B)

the remuneration is offered or transferred by a person under such rule during the 2-year period beginning on the date the rule is first promulgated.

(2)

A practice described in this paragraph is a practice under which a health care provider or facility pays, in whole or in part, premiums for medicare supplemental policies for individuals entitled to benefits under part A of subchapter XVIII of this chapter pursuant to section 426-1 of this title

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[1] So in original. Probably should not be capitalized.

[2] So in original. Two subpars. (D) have been enacted.

TITLE 42 > CHAPTER 7 > SUBCHAPTER XI > Part A > Sec. 1320b-10.

Sec. 1320b-10. - Prohibition of misuse of symbols, emblems, or names in reference to Social Security or Medicare

(a) Prohibited acts

(1)

No person may use, in connection with any item constituting an advertisement, solicitation, circular, book, pamphlet, or other communication, or a play, motion picture, broadcast, telecast, or other production, alone or with other words, letters, symbols, or emblems -

(A)

the words "Social Security", "Social Security Account", "Social Security System", "Social Security Administration", "Medicare", "Health Care Financing Administration", "Department of Health and Human Services", "Health and Human Services", "Supplemental Security Income Program", or "Medicaid", the letters "SSA", "HCFA", "DHHS", "NHS", or "SSI", or any other combination or variation of such words or letters, or

(B)

a symbol or emblem of the Social Security Administration, Health Care Financing Administration, or Department of Health and

Human Services (including the design of, or a reasonable facsimile of the design of, the social security card issued pursuant to section 405(c)(2)(f) of this title or the Medicare card,,[1] the check used for payment of benefits under subchapter II of this chapter, or envelopes or other stationery used by the Social Security Administration, Health Care Financing Administration, or Department of Health and Human Services), or any other combination or variation of such symbols or emblems, in a manner which such person knows or should know would convey, or in a manner which reasonably could be interpreted or construed as conveying, the false impression that such item is approved, endorsed, or authorized by the Social Security Administration, the Health Care Financing Administration, or the Department of Health and Human Services or that such person has some connection with, or authorization from, the Social Security Administration, the Health Care Financing Administration, or the Department of Health and Human Services. The preceding provisions of this subsection shall not apply with respect to the use by any agency or instrumentality of a State or political subdivision of a State of any words or letters which identify an agency or instrumentality of such State or of a political subdivision of such State or the use by any such agency or instrumentality of any symbol or emblem of an agency or instrumentality of such State or a political subdivision of such State.

(2)

(A)

No person may, for a fee, reproduce, reprint, or distribute any item consisting of a form, application, or other publication of the Social Security Administration unless such person has obtained specific, written authorization for such activity in accordance with regulations which the Commissioner of Social Security shall prescribe.

(B)

No person may, for a fee, reproduce, reprint, or distribute any item consisting of a form, application, or other publication of the Department of Health and Human Services unless such person has obtained specific, written authorization for such activity in accordance with regulations which the Secretary shall prescribe.

(3)

Any determination of whether the use of one or more words, letters, symbols, or emblems (or any combination or variation thereof) in connection with an item described in paragraph (1) or the reproduction, reprinting, or distribution of an item described in paragraph (2) is a violation of this subsection shall be made without regard to any inclusion in such item (or any so reproduced, reprinted, or distributed copy thereof) of a disclaimer of affiliation with the United States Government or any particular agency or instrumentality thereof.

(b) Civil penalties

The Commissioner or the Secretary (as applicable) may, pursuant to regulations, impose a civil money penalty not to exceed -

(1)

except as provided in paragraph (2), $5,000, or

(2)

in the case of a violation consisting of a broadcast or telecast, $25,000,

against any person for each violation by such person of subsection (a) of this section. In the case of any items referred to in subsection (a)(1) of this section consisting of pieces of mail, each such piece of mail which contains one or more words, letters, symbols, or emblems in violation of subsection (a) of this section shall represent a separate violation. In the case of any item referred to in subsection (a)(2) of this section, the reproduction, reprinting, or distribution of such item shall be treated as a separate violation with respect to each copy thereof so reproduced, reprinted, or distributed.

(c) Application of other law; compromise, recovery, and deposit into Treasury of civil money penalties

(1)

The provisions of section 1320a-7a of this title (other than subsections (a), (b), (f), (h), and (i) and the first sentence of subsection (c)) shall apply to civil money penalties under subsection (b) of this section

in the same manner as such provisions apply to a penalty or proceeding under section 1320a-7a(a) of this title.

(2)

Penalties imposed against a person under subsection (b) of this section may be compromised by the Commissioner or the Secretary (as applicable) and may be recovered in a civil action in the name of the United States brought in the district court of the United States for the district in which the violation occurred or where the person resides, has its principal office, or may be found, as determined by the Commissioner or the Secretary (as applicable). Amounts recovered under this section shall be paid to the Commissioner or the Secretary (as applicable) and shall be deposited as miscellaneous receipts of the Treasury of the United States, except that

(A)

to the extent that such amounts are recovered under this section as penalties imposed for misuse of words, letters, symbols, or emblems relating to the Social Security Administration, such amounts shall be deposited into the Federal Old-Age and Survivors Insurance Trust Fund, and

(B)

to the extent that such amounts are recovered under this section as penalties imposed for misuse of words, letters, symbols, or emblems relating to the Department of Health and Human

Services, such amounts shall be deposited into the Federal Hospital Insurance Trust Fund or the Federal Supplementary Medical Insurance Trust Fund, as appropriate. The amount of such penalty when finally determined, or the amount agreed upon in compromise, may be deducted from any sum then or later owing by the United States to the person against whom the penalty has been imposed.

(d) Enforcement

The preceding provisions of this section may be enforced through the Office of the Inspector General of the Social Security Administration or the Office of the Inspector General of the Department of Health and Human Services (as appropriate)

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[1] So in original.